Boise Cascade Corporation *and* Local No. 1136, Western Council of Industrial Workers, Chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the Inland Empire District Council W.C.I.W., AFL–CIO. Case 19–CA–20044

August 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On a charge filed on October 24, 1988, by Local No. 1136, Western Council of Industrial Workers, Chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the Inland Empire District Council W.C.I.W., AFL–CIO (Union), the General Counsel of the National Labor Relations Board issued a complaint on March 28, 1989, against Boise Cascade Corporation, the Respondent. The complaint alleged that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by unilaterally granting, and then withdrawing, a $450 benefit only to nonstriking employees, without first bargaining with the Union, and by dealing directly with those employees. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On April 21, 1989, the Respondent, the Union, and counsel for the General Counsel filed with the Board a stipulation for transfer and of facts, with attachments and a joint motion to transfer proceedings to the Board. The parties agreed that the stipulation of facts with attachments should constitute the entire record in this case, and that no oral testimony was necessary or desired by any of the parties. The parties waived a hearing and the issuance of an administrative law judge's decision and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a decision and order. On July 27, 1989, the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, the Union, and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding,[1] the Board makes the following

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

FINDINGS OF FACT

I. JURISDICTION

Boise Cascade Corporation, a Delaware corporation, has at all times material engaged in the business of lumber production at its office and place of business in Kettle Falls, Washington. During the 12 months preceding the issuance of the complaint, a representative period, the Respondent had gross sales of goods and services valued in excess of $500,000. During the same period, the Respondent sold and shipped goods or provided services from its facilities within the State of Washington, to customers outside the State of Washington, or sold and shipped goods or provided services to customers within the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. Also, during the same period, the Respondent purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside the State, or from suppliers within the State which, in turn, obtained goods and materials directly from sources outside the State. Accordingly, in agreement with the stipulation of the parties, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent has, for many years, recognized the Union as the exclusive collective-bargaining representative for a unit of its Kettle Falls employees[2] and has embodied such recognition in successive collective-bargaining agreements, the most recent of which is effective from August 1, 1988, to August 1, 1991.

On or about June 20, 1988,[3] the Kettle Falls bargaining unit employees began honoring sympathy pickets of other Western Council of Industrial Workers Union Locals whose contracts with the Respondent had expired. Following the expiration of the Kettle Falls collective-bargaining agreement on August 1, the sympathy strike was converted into a primary, eco-

[2] The following unit of the Respondent's employees constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All of the Respondent's production and maintenance employees, including temporary and part-time employees, at its Kettle Falls, Washington, operation, excluding office-clerical employees, guards and supervisors, technical and professional employees as defined in the Labor-Management Relations Act of 1947, as amended.

[3] All dates will be 1988 unless otherwise noted.

nomic strike that lasted until about August 20. Approximately 175 unit employees honored the picket line; however, 9 others, called crossovers, resigned their membership in the Union during the sympathy strike and crossed the picket line to return to work. The Respondent continued to operate during the strikes, primarily with supervisors and salaried employees from Kettle Falls and other company locations.[4]

During a morning break on about July 25, some of the crossovers engaged Regional Manager Dick Just in a discussion about how salaried employees who lived out of town, but worked in Kettle Falls on assignments from other locations, were being compensated.[5] The nine crossovers began joking among themselves and with Just about places they could be assigned to work which might entitle them to an expense account, or to spend a weekend at a resort, such as Coeur d'Alene, Idaho. This trip to a resort became the subject of joking for several days among the crossover employees and management. Just eventually told the crossovers that he could not do what they had asked.

Continuing contract negotiations between the Respondent and the Union led to a ratification vote, and on Friday, August 19, the Respondent held informational meetings with nonstriking employees to announce that the striking unit members had ratified the agreement and would return on Monday, August 22. At these meetings, Just also informed the crossovers of his decision to send them and their spouses on a weekend vacation to a resort hotel in Coeur d'Alene, Idaho,[6] but instructed them to keep it quiet. Prior to its early October presentation to the crossovers of the gift certificates covering all hotel and meal expenses,[7] the Respondent neither notified the Union nor asked it to meet and bargain about granting awards.

The Union learned about the gift certificate awards during a grievance-arbitration hearing on October 13, and on October 24 it filed the subject 8(a)(1), (3), and (5) charges against the Respondent. The Respondent requested a meeting with the union committee for November 16. At this meeting Just apologized for having ''screwed up,'' saying that the certificates were not intended to be used to rub in the noses of union members, but rather ''was a 'thank you' to these [crossover] employees because they had been a tremendous help during the strike.'' Just also offered some suggestions for resolving the unfair labor practice charges.[8] The charges were not resolved at this meeting.

Shortly after the November 16 meeting, but before issuance of the subject complaint, the Respondent met with the crossovers for the purpose of requesting return of the certificates, again without prior notification or bargaining with the Union. At the meeting eight unused certificates were returned and the Respondent was subsequently reimbursed the value of the remaining certificate prior to the issuance of the complaint. The Respondent notified the Union of the return of the certificates.[9]

B. *Contentions of the Parties*

The General Counsel and the Union contend that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing employment terms and conditions, i.e., by granting $450 gift certificates to crossovers, and subsequently withdrawing them, and by dealing directly with its employees. They assert that the Respondent's conduct also violated Section 8(a)(3) and (1) by rewarding employees for abandoning the Union and refraining from striking, and thereby sending a clear message that would tend to discourage them from engaging in future union or other protected activity. They accordingly urge that, in addition to issuing a cease-and-desist order, the Board require the Respondent to give $450 gift certificates to all unit employees. They argue that this is the only practical method of ''restoring the statutorily required equality of treatment as between employees who engaged in concerted activity and those who refrained therefrom. . . .'' *Aero-Motive Mfg. Co.*, 195 NLRB 790, 793 (1972), enfd. 475 F.2d 27 (6th Cir. 1973).

The Respondent argues for dismissal of the complaint as moot, because it apologized to the Union and recovered the certificates prior to the complaint issuance, because there is no reasonable expectation that such conduct will be repeated. Alternatively, the Respondent asserts that it at all times strictly complied with the contractual terms and conditions of employment, which it did not alter by awarding these gifts for a legitimate business purpose. Finally, the Respondent contends that an order requiring the award of gift certificates to all unit employees is punitive and hence exceeds the Board's statutory authority.

C. *Discussion*

We find, for the reasons set forth below, that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act.

[4] During the strike, the work force generally worked 12-hour shifts and were compensated for all hours worked including overtime.

[5] The Respondent paid the expenses of out-of-town salaried employees during the period of their assignment to Kettle Falls, including the expenses of biweekly trips home.

[6] Just told the crossovers that he was granting their request for a weekend trip in consideration for their long hours of work and dedication which enabled the Respondent to meet its contract orders.

[7] It is stipulated that the certificates have a value of $450 each.

[8] Just did not suggest withdrawing the already issued gift certificates at this meeting.

[9] After learning of the gift certificates to crossovers, the Union apprised its membership of the subsequent occurrences and status of the pending unfair labor practice charge.

It is well settled that employers violate Section 8(a)(1) of the Act by granting special benefits to nonstriking employees while depriving strikers of those same benefits merely because they chose to engage in strike activity.[10] Here, the Respondent argues that its sole motive in granting benefits was as a ''thank you'' for work performed during the strike rather than as punishment of employees for engaging in protected or union activities. However, in such nonstriker award cases, the Board predicates the violation finding not on the Respondent's subjective motivation, but rather on the objective impact of its action, namely, the tendency of its current rewards for nonstrikers to interfere with the employees' future exercise of their right to engage in protected concerted activities. Accordingly, we find that the Respondent's grant of the free weekend gift certificates only to nonstrikers violated Section 8(a)(1).[11]

We further find, contrary to the Respondent, that the award of a free weekend to the crossover employees constituted a term and condition of employment—because it was a benefit related to their job performance, i.e., their active employment during the strike—and thus was a mandatory subject of bargaining. As the Respondent admittedly failed to notify or bargain with its employees' collective-bargaining representative, and instead dealt directly with the crossover employees concerning the grant and withdrawal of the gift certificate benefit,[12] we find that the Respondent thereby violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and post the appropriate notice.

As a remedy for the Respondent's unlawful payment of the gift certificate benefit, the General Counsel and Union have requested that this benefit be made available to both the strikers and nonstrikers, citing Aero-Motive, supra. We disagree.

In *Aero-Motive*, the Board ordered that $100 bonuses which the employer had unlawfully paid to its employees who had crossed the picket lines be also paid to its striking employees. In that case, however, the Respondent did not request the return of the bonuses, and in fact the bonuses were not returned by the crossovers. In that situation, the Board considered and rejected as a remedy the requirement that the Respondent rescind all bonus payments as a means of restoring the statutorily required equality of treatment of striking and nonstriking employees, on the ground that recission would be impractical and would create greater discord among the employees than that currently existing as a result of the employer's wrongful action. The court of appeals affirmed the Board's remedy, stating, ''Further, there appears to be no practical alternative to the remedy prescribed by the Board.'' *NLRB v. Aero-Motive Mfg. Co*., 475 F.2d at 28. The General Counsel and the Union also cite, to the same effect, *Swedish Hospital Medical Center*, supra. In that case, however, as in *Aero-Motive*, the Respondent did not attempt to remedy its unlawful conduct, which consisted of providing nonstrikers and crossovers with a compensatory day off with pay in appreciation for their working during the strike.

In constrast to the employers in those cases, the Respondent here rescinded the gift certificate benefits prior to the issuance of the complaint. Although it is true, as our dissenting colleague points out, that the rescission was unlawful insofar as it was done without advance bargaining with the Union, the fact remains that the rescission mitigated the impact of the unlawful conduct insofar as it interfered with the Section 7 rights of strikers in violation of Section 8(a)(1) of the Act. Thus, the remedy granted in *Aero-Motive* and *Swedish Hospital*, ordering the respondent employer to grant benefits to the entire unit is not needed in the present case in order to eliminate a divisive difference between strikers and nonstrikers in their terms and conditions of employment. As for the 8(a)(5) violation, we believe that a cease-and-desist order is sufficient. This is not a case, like *Bellingham Frozen Foods*, 237 NLRB 1450, 1467 fn. 30 (1978), cited by our colleague, involving benefits granted to unit employees unilaterally, but on a nondiscriminatory basis. In such cases the Board makes clear that, absent a request by the employees' union representative to bargain over a particular grant of benefits, the Board's order is not to be construed as requiring the employer to rescind benefits. When benefits are in the hands of employees and the only unlawfulness in their original grant is that the union was not consulted, it makes sense to leave it at the option of the union whether to leave things as they are or to reopen the subject and bargain over the particular grant. A Board order requiring a change in the status quo to the detriment of all the employees would not effectuate the purposes of the Act. Our Order in the present case does not do that.

A different result would undoubtedly be called for in this case had the Respondent's effort to rescind the

[10] See *Aero-Motive*, supra; *Swedish Hospital Medical Center*, 232 NLRB 16, 19 (1977), supp. decision 238 NLRB 1087 (1978), enfd. 619 F.2d 33 (9th Cir. 1980). As in those cases, the evidence here shows that the benefits were not offered as an inducement for employees to work during the strike.

[11] Member Devaney, in light of this 8(a)(1) finding, and Member Cracraft, as stated in her separate opinion, find it unnecessary to pass on the 8(a)(3) allegation of the complaint. Chairman Stephens would find the Respondent's disparate treatment of strikers and nonstrikers violated Sec. 8(a)(3), as well as Sec. 8(a)(1). Cf. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[12] We reject the Respondent's claim that the evidence is insufficient to show that it requested the withdrawal of the certificates. The stipulation clearly states that the meeting it had with the crossovers was for the purpose of requesting the return of the certificates and that in fact the unredeemed certificates were returned at this meeting.

benefit unlawfully granted to the nonstrikers been accompanied by statements that the benefits had been properly granted and that the Respondent and the nonstrikers were being unfairly penalized by actions of the Union. According to the stipulation, however, the Respondent's regional manager admitted to the Union that he had ''screwed up'' in awarding the vacation certificates to the nonstrikers. In the unusual circumstances of this case, then, we find it unnecessary to direct that every unit employee be awarded a $450 vacation gift certificate. Accordingly, we shall grant only a cease-and-desist order to remedy the Respondent's violations.

CONCLUSIONS OF LAW

1. The Respondent, Boise Cascade Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By granting $450 gift certificate benefits to nonstriking employees and denying those benefits to bargaining unit employees who engaged in protected concerted activity, the Respondent has violated Section 8(a)(1) of the Act.

4. By unilaterally granting and subsequently withdrawing the gift certificate benefits without notifying or bargaining with the Union, and by dealing directly with its bargaining unit employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Boise Cascade Corporation, Kettle Falls, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting benefits only to nonstriking employees and denying those same benefits to employees who engaged in concerted protected activity.

(b) Refusing to bargain collectively with Local No. 1136, Western Council of Industrial Workers, Chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the Inland Empire District Council W.C.I.W., AFL–CIO by refusing to notify and bargain with the Union over changes in terms and conditions of employment of bargaining unit employees and by dealing directly with bargaining unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Kettle Falls, Washington facility copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, dissenting in part.

I agree with my colleagues that the Respondent's conduct violated Section 8(a)(1) and (5). Contrary to my colleagues, however, I would not reward the Respondent for committing an 8(a)(5) violation by withholding the monetary award necessary to remedy the 8(a)(1) violation.

In June 1988[1] bargaining unit employees began honoring other unions' picket lines. In early August the sympathy strike was converted to an economic strike. In late August the Respondent and the Union reached a settlement and the economic strike ended.

During the sympathy strike, 9 of approximately 175 bargaining unit employees resigned membership in the Union, crossed the picket line, and returned to work. When the strike concluded, the Respondent informed the crossover employees[2] that the Company intended to give them certificates worth $450, but told them to ''keep this decision quiet.'' In early October the Respondent presented the certificates.

On October 13 at an arbitration hearing the Union learned about the certificates. On October 24 the Union filed the instant unfair labor practice charge.

In November the Respondent and the Union discussed the unfair labor practice charge but reached no settlement. A short time after the meeting, the Respondent met with the crossover employees and requested return of the certificates. The crossover employees returned the certificates, or their value.

The Respondent did not notify the Union about its intention to award the certificates, did not bargain with the Union before awarding the certificates, did not notify the Union about its decision to withdraw the certificates, and did not bargain with the Union before obtaining the return of the certificates.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] All subsequent dates are in 1988 unless otherwise indicated.

[2] The employees who crossed the picket lines and returned to work.

I agree with my colleagues that the Respondent violated Section 8(a)(5) by granting the crossover employees the certificates in October and by withdrawing the certificates in November without notifying or bargaining with the Union about either action. I also agree that granting the certificates to crossover employees and denying the same benefit to striking employees tends to interfere with employees' future exercise of the right to engage in protected strike activity in violation of Section 8(a)(1).[3]

I disagree, however, with my colleagues' refusal to require the Respondent to grant certificates to all bargaining unit employees. I believe requiring the Respondent to provide the benefit to all unit employees is the only remedy for the violations in this case that accords with Board precedent.

In *Aero-Motive Mfg. Co.*, 195 NLRB 790 (1972), enfd. 475 F.2d 27 (6th Cir. 1973), cert. denied 414 U.S. 922 (1973), the Board found an employer violated the Act by paying bonuses to employees who refused to engage in a strike. The Board's remedy, which was fashioned to restore the statutorily required equality of treatment between employees, was to require the respondent to pay an equivalent amount to employees who engaged in the strike. Id. at 793.[4]

In attempting to distinguish *Aero-Motive*, the majority relies solely on the Respondent's rescinding of the certificates before the complaint issued,[5] claiming the rescission serves to mitigate the impact of the unlawful conduct. For the following reasons, I do not find this distinction legally significant in the circumstances of this case.

First, absent the Respondent's rescission of the certificates, there can be no doubt that the *Aero-Motive* remedy would be warranted here to undo the effects of the Respondent's violation of Section 8(a)(1). As stated above, the majority finds, and I agree, that the Respondent's rescission of the certificates violated Section 8(a)(5). Therefore, by withholding the *Aero-Motive* remedy because the Respondent rescinded the certificates, the majority is rewarding the Respondent for committing an additional unfair labor practice. In my view, the Board should not ''permit the wrongdoer to profit by its illegal acts.'' *Packerland Packing Co.*, 185 NLRB 653, 654 (1970), quoting *Showell Poultry Co.*, 105 NLRB 580, 581 (1953). Accord: *Industrial Acoustics Co. v. NLRB*, 912 F.2d 717 fn. 3 (4th Cir. 1990).

Second, it is well established that the Board does not require an employer to rescind benefits that were unlawfully granted. *Bellingham Frozen Foods*, 237 NLRB 1450, 1467 fn. 30 (1978). The reason for this Board Rule is ''to avoid use of the Board's processes to deprive employees of a benefit already conferred.'' Ibid. In this case, the Respondent granted the benefit to the crossovers after first telling them to ''keep [it] quiet'' and then withdrew the benefit once the Union filed an unfair labor practice charge. Had the Union never filed an unfair labor practice charge, it is clear that the crossovers would have enjoyed the benefit of the $450 certificates. On this record, the conclusion is inescapable that the Respondent deprived employees of a benefit because their bargaining representative invoked the Board's processes. Under Board policy as set forth in *Bellingham*, such a result should not be permitted to stand.

Third, an effect of my colleagues' decision is precisely one the Board attempted to avoid in *Aero-Motive*. In that case, the Board found that the employer's grant of a special bonus to nonstrikers ''created a divisive wedge in the work force.'' 195 NLRB at 792. The Board stated that ordering rescission of the benefit would ''create greater discord among the employees'' than that which currently existed. 195 NLRB at 793. In this case, the Respondent similarly granted a special benefit to employees who refrained from the strike. Then, after the Union filed the instant charge, the Respondent rescinded the benefit, an act which is not only independently violative of the statute, but which also serves to further alienate the crossovers from the Union and perpetuate the division within the bargaining unit caused by the Respondent's initial unfair labor practice. Contrary to my colleagues, I believe the Respondent's subsequent unlawful withdrawal of the certificates reinforces the need for the *Aero-Motive* remedy rather than mitigates the impact of the initial unlawful grant.

Finally, the majority's so-called distinction will encourage the commission of similar unfair labor practices. Today's decision advises employers they need not be concerned about violating the Act by rewarding employees for crossing a picket line because if caught an employer may avoid the *Aero-Motive* remedy simply by unilaterally rescinding the unlawful grant of benefit. Indeed, this is what happened in this case: The Respondent ''mitigated'' its unfair labor practice by committing another unfair labor practice, the latter of which is the very act the majority relies on the reason for providing no monetary award.[6]

[3] Because the remedy I would order for these violations encompasses the remedy that would be required for an 8(a)(3) violation, I find it unnecessary to address the complaint's 8(a)(3) allegation.

[4] See also *Desert Inn Country Club*, 282 NLRB 667, 668 (1987); *Rubatex Corp.*, 235 NLRB 833, 835 (1978), enfd. 601 F.2d 147 (4th Cir. 1979); and *Swedish Hospital Medical Center*, 232 NLRB 16 (1978), 238 NLRB 1087 (1978), enfd. 619 F.2d 33 (9th Cir. 1980).

[5] The complaint issued in March 1989.

[6] The majority states that awarding a $450 benefit to all employees would be ''akin to a penalty,'' citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9–12 (1940). In its subsequent decision in *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953), the Supreme Court cautioned against engaging in a semantic debate concerning what is ''remedial'' and what is ''punitive.'' The Court stated:

In sum, I believe that the *Aero-Motive* remedy applies to the facts of this case. As in *Aero-Motive*, the only way of restoring the statutorily required equality of treatment between employees is to require the Respondent to provide all unit employees the $450 certificate or its equivalent.

It seems more profitable to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the Act.

As discussed above, my colleagues' Order bears no appropriate relation to the policies of the Act because it rewards the Respondent for its own misconduct, places the onus for the loss of the benefit on the Union, and encourages employers to commit unfair labor practices.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT grant benefits to nonstrikers and deny those same benefits to employees who engage in protected concerted activity.

WE WILL NOT refuse to bargain collectively with Local No. 1136, Western Council of Industrial Workers, Chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the Inland Empire District Council W.C.I.W., AFL–CIO by refusing to notify and bargain with the Union over changes in terms and conditions of employment of bargaining unit employees and by dealing directly with bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BOISE CASCADE CORPORATION